

111TH CONGRESS
1ST SESSION

H. R. 1988

To amend title I of the Employee Retirement Income Security Act of 1974 to provide for independent investment advice for participants and beneficiaries under individual account plans.

IN THE HOUSE OF REPRESENTATIVES

APRIL 21, 2009

Mr. ANDREWS introduced the following bill; which was referred to the Committee on Education and Labor

A BILL

To amend title I of the Employee Retirement Income Security Act of 1974 to provide for independent investment advice for participants and beneficiaries under individual account plans.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Conflicted Investment
5 Advice Prohibition Act of 2009”.

6 **SEC. 2. FINDINGS.**

7 The Congress finds as follows:

1 (1) The market downturn of 2008 had a dev-
2 astating effect on the retirement security income of
3 millions of American workers.

4 (2) According to the Congressional Budget Of-
5 fice, \$2 trillion of Americans' retirement savings was
6 wiped out over a 15-month period starting in 2008.

7 (3) According to Congressional Budget Office
8 estimates, the value of pension funds and retirement
9 accounts dropped by roughly \$1 trillion last year.

10 (4) Individual average losses of participants in
11 401(k) plans ranged from 7.2 percent to 11.2 per-
12 cent in the first nine months of 2008, according to
13 an Employee Benefit Research Institute analysis of
14 2.2 million retirements account participants.

15 (5) During the first nine months of 2008,
16 stocks were down, with the S&P 500 index losing
17 more than 19 percent. With over two-thirds of the
18 assets in 401(k)-style defined contribution plans in-
19 vested in equities, either directly or through mutual
20 funds, participants are exposed to increased risk and
21 lack meaningful access to independent investment
22 advise to help them better plan for their retirement.

23 (6) Currently, 401(k) plan account holders have
24 access to a self-interested or conflicted investment
25 adviser.

1 (7) In 2007, the Government Accountability Of-
 2 fice concluded that conflicts of interest can have an
 3 adverse affect on defined benefit and defined con-
 4 tribution plans.

5 **SEC. 3. INDEPENDENT INVESTMENT ADVISERS FOR INDI-**
 6 **VIDUAL ACCOUNT PLANS.**

7 (a) IN GENERAL.—Section 3 of the Employee Retire-
 8 ment Income Security Act of 1974 (29 U.S.C. 1002) is
 9 amended by adding at the end the following new para-
 10 graph:

11 “(43) INDEPENDENT INVESTMENT ADVISER.—
 12 “(A) IN GENERAL.—The term ‘inde-
 13 pendent investment adviser’ means, with respect
 14 to an individual account plan that permits a
 15 participant or beneficiary to direct the invest-
 16 ment of assets in their individual account, a
 17 person who is a fiduciary of the plan by reason
 18 of the provision of investment advice referred to
 19 in section 3(21)(A)(ii) by the person to the plan
 20 or a participant or beneficiary of the plan and
 21 who meets the requirements of either subpara-
 22 graph (B) or (C).

23 “(B) REQUIREMENTS APPLICABLE TO IN-
 24 VESTMENT ADVISER.—An investment adviser

1 meets the requirements of this subparagraph,
2 if—

3 “(i) such adviser is—

4 “(I) registered as an investment
5 adviser under the Investment Advisers
6 Act of 1940 (15 U.S.C. 80b–1 et seq.)
7 or under the laws of the State in
8 which the adviser maintains its prin-
9 cipal office and place of business,

10 “(II) a bank or similar financial
11 institution referred to in section
12 408(b)(4) or a savings association (as
13 defined in section 3(b)(1) of the Fed-
14 eral Deposit Insurance Act (12 U.S.C.
15 1813(b)(1))), but only if the invest-
16 ment advice referred to in section
17 3(21)(A)(ii) which is provided by such
18 bank or institution is provided
19 through a trust department of the
20 bank or similar financial institution or
21 savings association which is subject to
22 periodic examination and review by
23 Federal or State banking authorities,
24 or

1 “(III) any other person, but only
2 if every individual providing the in-
3 vestment advice referred to in section
4 3(21)(A)(ii) on behalf of such person
5 (or on behalf of any affiliate thereof)
6 is a registered representative,

7 “(ii) such adviser (and any affiliate
8 thereof) does not provide or manage any
9 investments in which plan assets of any in-
10 dividual account plan is invested,

11 “(iii) the fees or other compensation
12 received, directly or indirectly, by such ad-
13 viser (and any affiliate thereof) with re-
14 spect to the provision of investment advice
15 to any individual account plan or the par-
16 ticipants or beneficiaries of such a plan ei-
17 ther—

18 “(I) are not received from any
19 person or persons (or anyone affili-
20 ated with such persons) that market,
21 sell, manage or provide investments in
22 which plan assets of any individual ac-
23 count plan are invested, or

24 “(II) do not vary depending on
25 the basis of any investment option se-

1 lected, and are calculated pursuant to
2 one or more of the following bases—

3 “(aa) a flat-dollar basis,

4 “(bb) a flat percentage of
5 total plan assets basis, or

6 “(cc) a per-participant basis,

7 and

8 “(iv) such adviser provides the invest-
9 ment advice pursuant to a written arrange-
10 ment with the individual account plan
11 that—

12 “(I) provides that the investment
13 adviser is a fiduciary of the plan with
14 respect to the provision of the advice,

15 “(II) requires that the advice be
16 provided only by registered represent-
17 atives of the investment adviser or an
18 affiliate thereof,

19 “(III) discloses whether the in-
20 vestment adviser or any affiliate
21 thereof has any material financial, re-
22 ferral, or other relationship or ar-
23 rangement with a money manager,
24 broker, other client of the investment
25 adviser or any affiliate thereof, other

1 service provider to the plan, or any
2 other entity that creates or may cre-
3 ate a conflict of interest for the in-
4 vestment adviser in performing serv-
5 ices pursuant to the arrangement with
6 the plan and, if so, includes a descrip-
7 tion of such relationship or arrange-
8 ment,

9 “(IV) includes a representation
10 by the investment adviser that, before
11 the arrangement was entered into (or
12 extended or renewed), the investment
13 adviser provided to the plan fiduciary
14 that has authority to cause the em-
15 ployee benefit plan to enter into (or
16 extend or renew) the arrangement a
17 written statement disclosing all fees or
18 other compensation that the invest-
19 ment adviser or any affiliate thereof
20 anticipates to receive with respect to
21 the advice during the first year, or
22 other period if less than a year, of the
23 arrangement, and

24 “(V) provides that the investment
25 adviser will provide to such plan fidu-

1 ciary (and the participant and bene-
2 ficiary receiving the advice, if applica-
3 ble) a statement annually disclosing
4 all fees or other compensation that
5 the investment adviser or any affiliate
6 thereof has received with respect to
7 the advice during the prior year.

8 “(C) ADVICE PROVIDED TO PARTICIPANTS
9 AND BENEFICIARIES UNDER AN INVESTMENT
10 ADVICE PROGRAM MEETING REQUIREMENTS.—

11 An investment adviser meets the requirements
12 of this subparagraph if the investment advice
13 provided by the adviser, to the extent that such
14 advice is provided to participants and bene-
15 ficiaries of individual account plans, is provided
16 under an investment advice program with re-
17 spect to which the requirements of clauses (i)
18 through (x) are met.

19 “(i) ADVISER REQUIREMENTS.—The
20 requirements of this clause are met if the
21 investment adviser providing the invest-
22 ment advice under the program is—

23 “(I) described in subclauses (I)
24 or (II) of subparagraph (B)(i),

1 “(II) an insurance company
2 qualified to do business under the
3 laws of a State,

4 “(III) a person registered as a
5 broker or dealer under the Securities
6 Exchange Act of 1934 (15 U.S.C. 78a
7 et seq.),

8 “(IV) an affiliate of a person de-
9 scribed in any of subclauses (I)
10 through (III), or

11 “(V) an employee, agent, or reg-
12 istered representative of a person de-
13 scribed in subclauses (I) through (IV)
14 who satisfies the requirements of ap-
15 plicable insurance, banking, and secu-
16 rities laws relating to the provision of
17 the advice.

18 “(ii) COMPUTER MODEL.—The re-
19 quirements of this clause are met if the in-
20 vestment advice provided under the invest-
21 ment advice program is provided pursuant
22 to a computer model that—

23 “(I) applies generally accepted
24 investment theories that take into ac-
25 count the historic returns of different

1 asset classes over defined periods of
2 time,

3 “(II) utilizes relevant information
4 about the participant, which may in-
5 clude age, life expectancy, retirement
6 age, risk tolerance, other assets or
7 sources of income, and preferences as
8 to certain types of investments,

9 “(III) utilizes prescribed objective
10 criteria to provide asset allocation
11 portfolios comprised of investment op-
12 tions available under the plan,

13 “(IV) operates in a manner that
14 is not biased in favor of investments
15 offered by the investment adviser or
16 any person with a material affiliation
17 or contractual relationship with the
18 investment adviser, and

19 “(V) takes into account all in-
20 vestment options under the plan in
21 specifying how a participant’s account
22 balance should be invested and is not
23 inappropriately weighted with respect
24 to any investment option.

25 “(iii) CERTIFICATION.—

1 “(I) IN GENERAL.—The require-
2 ments of this clause are met with re-
3 spect to the program if an eligible in-
4 vestment expert certifies, prior to the
5 utilization of the computer model and
6 in accordance with rules prescribed by
7 the Secretary, that the computer
8 model meets the requirements of
9 clause (ii).

10 “(II) RENEWAL OF CERTIFI-
11 CATIONS.—If, as determined under
12 regulations prescribed by the Sec-
13 retary, there are material modifica-
14 tions to the computer model, the re-
15 quirements of this subparagraph are
16 met only if a certification described in
17 subclause (I) is obtained with respect
18 to the computer model as so modified.

19 “(III) ELIGIBLE INVESTMENT
20 EXPERT.—For purposes of this
21 clause, the term ‘eligible investment
22 expert’ means any person—

23 “(aa) which meets such re-
24 quirements as the Secretary may
25 provide, and

1 “(bb) does not bear any ma-
2 terial affiliation or contractual
3 relationship with any investment
4 adviser or a related person there-
5 of (or any employee, agent, or
6 registered representative of the
7 investment adviser or related per-
8 son).

9 “(iv) EXCLUSIVITY OF RECOMMENDA-
10 TION.—The requirements of this clause are
11 met with respect to the program, if—

12 “(I) the only investment advice
13 provided under the program is the ad-
14 vice generated by the computer model
15 described in clause (ii), and

16 “(II) any transaction pursuant to
17 the investment advice occurs solely at
18 the direction of the participant or
19 beneficiary.

20 “(v) EXPRESS AUTHORIZATION BY
21 SEPARATE FIDUCIARY.—The requirements
22 of this clause are met with respect to the
23 program if the program is expressly au-
24 thorized by a plan fiduciary other than—

1 “(I) the person offering the pro-
2 gram,

3 “(II) any person providing in-
4 vestment options under the plan, and

5 “(III) any affiliate of either per-
6 son described in subclause (I) or (II).

7 “(vi) ANNUAL AUDIT.—The require-
8 ments of this clause are met with respect
9 to the program if an independent auditor,
10 who has appropriate technical training or
11 experience and proficiency and so rep-
12 resents in writing—

13 “(I) conducts an annual audit of
14 the program for compliance with the
15 requirements of this subparagraph,
16 and

17 “(II) following completion of the
18 annual audit, issues a written report
19 to the fiduciary who authorized use of
20 the program which presents its spe-
21 cific findings regarding compliance of
22 the program with the requirements of
23 this subsection.

24 For purposes of this clause, an auditor is
25 considered independent if it is not related

1 to the person offering the program to the
2 plan and is not affiliated with any person
3 providing investment options under the
4 plan.

5 “(vii) DISCLOSURE.—The require-
6 ments of this clause are met with respect
7 to the program, if—

8 “(I) the investment adviser pro-
9 vides to the participant or beneficiary
10 receiving investment advice under the
11 program with regard to any security
12 or other property offered as an invest-
13 ment option, before providing the ad-
14 vice, a written notification (which may
15 consist of notification by means of
16 electronic communication)—

17 “(aa) of the role of any
18 party that has a material affili-
19 ation or contractual relationship
20 with the investment adviser in
21 the development of the invest-
22 ment advice program and in the
23 selection of investment options
24 available under the plan,

1 “(bb) of all fees or other
2 compensation relating to the ad-
3 vice that the investment adviser
4 or any affiliate thereof is to re-
5 ceive (including compensation
6 provided by any third party) in
7 connection with the provision of
8 the advice or in connection with
9 the sale, acquisition, or holding
10 of the security or other property,

11 “(cc) of any material affili-
12 ation or contractual relationship
13 of the investment adviser or af-
14 filiates thereof in the security or
15 other property,

16 “(dd) of the manner, and
17 under what circumstances, any
18 information relating to the par-
19 ticipant or beneficiary which is
20 provided under the program will
21 be used or disclosed,

22 “(ee) of the types of services
23 provided by the investment ad-
24 viser in connection with the pro-

1 vision of investment advice by the
2 investment adviser, and

3 “(ff) that a recipient of the
4 advice may separately arrange
5 for the provision of advice by an-
6 other adviser, that could have no
7 material affiliation with, and
8 could receive no fees or other
9 compensation, in connection with
10 the security or other property,
11 and

12 “(II) at all times during the pro-
13 vision of advisory services to the par-
14 ticipant or beneficiary, the investment
15 adviser—

16 “(aa) maintains the infor-
17 mation described in subclause (I)
18 in accurate form and in the man-
19 ner described in clause (ix),

20 “(bb) provides, without
21 charge, accurate information to
22 the recipient of the advice no less
23 frequently than annually,

24 “(cc) provides, without
25 charge, accurate information to

1 the recipient of the advice upon
2 request of the recipient, and

3 “(dd) provides, without
4 charge, accurate information to
5 the recipient of the advice con-
6 cerning any material change to
7 the information required to be
8 provided to the recipient of the
9 advice at a time reasonably con-
10 temporaneous to the change in
11 information.

12 “(viii) OTHER CONDITIONS.—The re-
13 quirements of this clause are met with re-
14 spect to the program, if—

15 “(I) the investment adviser pro-
16 vides appropriate disclosure, in con-
17 nection with the sale, acquisition, or
18 holding of the security or other prop-
19 erty with respect to which the invest-
20 ment advice is provided under the
21 program, in accordance with all appli-
22 cable securities laws,

23 “(II) the sale, acquisition, or
24 holding occurs solely at the direction
25 of the recipient of the advice,

1 “(III) the compensation received
2 by the investment adviser and affili-
3 ates thereof in connection with the
4 sale, acquisition, or holding of the se-
5 curity or other property is reasonable,
6 and

7 “(IV) the terms of the sale, ac-
8 quisition, or holding of the security or
9 other property are at least as favor-
10 able to the plan as an arm’s length
11 transaction would be.

12 “(ix) STANDARDS FOR PRESENTATION
13 OF INFORMATION.—

14 “(I) IN GENERAL.—The require-
15 ments of this clause are met with re-
16 spect to the program if the notifica-
17 tion required to be provided to partici-
18 pants and beneficiaries under clause
19 (vii)(I) is written in a clear and con-
20 spicuous manner and in a manner cal-
21 culated to be understood by the aver-
22 age plan participant and is sufficiently
23 accurate and comprehensive to rea-
24 sonably apprise such participants and
25 beneficiaries of the information re-

1 quired to be provided in the notifica-
2 tion.

3 “(II) MODEL FORM FOR DISCLO-
4 SURE OF FEES AND OTHER COM-
5 PENSATION.—The Secretary shall
6 issue a model form for the disclosure
7 of fees and other compensation re-
8 quired in clause (vii)(I)(bb) which
9 meets the requirements of subclause
10 (I).

11 “(x) MAINTENANCE FOR 6 YEARS OF
12 EVIDENCE OF COMPLIANCE.—The require-
13 ments of this clause are met with respect
14 to the program if the investment adviser
15 who provides advice under the program
16 maintains, for a period of not less than 6
17 years after the provision of the advice, any
18 records necessary for determining whether
19 the requirements of the preceding provi-
20 sions of this subparagraph and of sub-
21 section (b)(14) have been met. A trans-
22 action prohibited under section 406 shall
23 not be considered to have occurred solely
24 because the records are lost or destroyed
25 prior to the end of the 6-year period due

1 to circumstances beyond the control of the
2 investment adviser.

3 “(D) DEFINITIONS.—For purposes of this
4 paragraph—

5 “(i) AFFILIATE.—The term ‘affiliate’
6 of an investment adviser means any person
7 directly or indirectly (through one or more
8 intermediaries) controlling, controlled by,
9 or under common control with the invest-
10 ment adviser, or any officer, director,
11 agent, or employee of, or partner with, the
12 investment adviser.

13 “(ii) REGISTERED REPRESENTA-
14 TIVE.—The term ‘registered representa-
15 tive’ of another entity means a person de-
16 scribed in section 3(a)(18) of the Securi-
17 ties Exchange Act of 1934 (15 U.S.C.
18 78c(a)(18)) (substituting the entity for the
19 broker or dealer referred to in such sec-
20 tion) or a person described in section
21 202(a)(17) of the Investment Advisers Act
22 of 1940 (15 U.S.C. 80b–2(a)(17)) (sub-
23 stituting the entity for the investment ad-
24 viser referred to in such section).

1 “(iii) FEES OR OTHER COMPENSA-
2 TION.—The term ‘fees or other compensa-
3 tion’ includes money or any other thing of
4 monetary value (for example, gifts, awards,
5 and trips) received, or to be received, di-
6 rectly from the plan or plan sponsor or in-
7 directly (i.e., from any source other than
8 the plan or the plan sponsor) by the invest-
9 ment adviser or any affiliate thereof in
10 connection with the advice to be provided
11 pursuant to the arrangement or because of
12 the investment adviser’s or any affiliate’s
13 position with the plan. Fees or other com-
14 pensation may be expressed in terms of a
15 monetary amount, percentage of the plan’s
16 assets, or per capita charge for each par-
17 ticipant or beneficiary of the plan. The
18 manner in which compensation or fees are
19 expressed shall contain sufficient informa-
20 tion to enable the plan fiduciary to evalu-
21 ate the reasonableness of such compensa-
22 tion or fees.”.

23 (b) FIDUCIARY DUTIES WITH RESPECT TO INVEST-
24 MENT ADVICE.—Section 404(a) of such Act (29 U.S.C.

1 1104(a)) is amended by adding at the end the following
2 new paragraph:

3 “(3)(A) The fiduciary of an individual account plan
4 that permits a participant or beneficiary to direct the in-
5 vestment of assets in the individual account shall not ap-
6 point, contract with, or otherwise arrange for an invest-
7 ment adviser to provide investment advice referred to in
8 section 3(21)(A)(ii) to the plan or the participant or bene-
9 ficiary unless the investment adviser is an independent in-
10 vestment adviser (as defined in section 3(43)(A)).

11 “(B) The independent investment adviser providing
12 investment advice to a plan or to a participant or bene-
13 ficiary shall provide, before the initial provision of the ad-
14 vice, a written notification (which may consist of notifica-
15 tion by means of electronic communication)—

16 “(i) of the past performance and historical
17 rates of return of the investment options available
18 with respect to the plan and comparisons of such op-
19 tions to relevant benchmarks, and

20 “(ii) that the investment adviser is acting as a
21 fiduciary of the plan in connection with the provision
22 of the advice.

23 “(C) Nothing in this paragraph shall be construed to
24 exempt a plan sponsor or other person who is a fiduciary
25 from any requirement of this part for the prudent selec-

tion and periodic review of an independent investment adviser with whom the plan sponsor or other person enters into an arrangement for the provision of investment advice referred to in section 3(21)(A)(ii). The plan sponsor or other person who is a fiduciary has no duty under this part to monitor the specific investment advice given by the independent investment adviser to any particular recipient of the advice.

“(D) Nothing in this part shall be construed to preclude the use of plan assets to pay for reasonable expenses in providing investment advice referred to in section 3(21)(A)(ii).”.

(c) CONFORMING AMENDMENTS.—Section 408 of such Act (29 U.S.C. 1108) is amended—

(1) by striking subsection (g); and

(2) by striking subsection (b)(14)(B) and inserting the following:

“(B) the investment advice is provided by an independent investment adviser (as defined in section 3(43)).”.

(d) REGULATORY AUTHORITY.—The Secretary of Labor may issue regulations providing that an investment adviser can still be considered as meeting the requirements of section 3(43)(B) of the Employee Retirement Income Security Act of 1974 despite the receipt of a de minimus

1 amount of compensation that fails to meet the require-
2 ments of section 3(43)(B)(iii) of such Act due to the exist-
3 ence of previously existing contracts.

4 (e) EFFECTIVE DATE.—The amendments made by
5 this section shall apply to plan years beginning after one
6 year after the date of the enactment of this Act.

○